Decision No. C02-399

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO.

DECISION ON REMAND AND OTHER ISSUES PERTAINING TO THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: April 10, 2002
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I. BACKGROUND

A. Decision No. R02-41-I granted Qwest's Motion for Remand of Specified Colorado Performance Assurance Plan (CPAP or Plan), issues to the Special Master, Professor Phil Weiser. The remand included the following four issues:

> 1) the Commission's reservation of the right unilaterally to change the CPAP [CPAP §§ 18.1 *et seq.*, 19.1];
>
> 2) the escalation clause for Tier 1 payments [CPAP § 8.2];
>
> 3) the inclusion of a monitoring measure for special access services; and
>
> 4) the definition of CLEC-affecting change [CPAP § 14.1].

The special access issue was remanded for the limited purpose of devising solutions for monitoring Qwest's special access services performance. The remand of the definition of CLEC-affecting change was for the limited purposes of making the CPAP language more practicable and for refining the definition of CLEC-affecting change.

B. On February 19, 2002 the Special Master submitted a Supplemental Report and Recommendation (Supplemental Report) on the remand issues and various CPAP implementation issues. The six parts of the Supplemental Report address: 1) requirements for data management processes; 2) change management requirements; 3) the escalation function; 4) the special access issue; 5) the changeability of the CPAP; and 6) assorted implementation issues.

C. Decision No. R02-173-I allowed participants to file comments on the Supplemental Report. Qwest; Joint CLECs comprised of AT&T Communications of the Mountain States, Inc. (AT&T), TCG Colorado, WorldCom, Inc. on behalf of its regulated subsidiaries (WorldCom), and Covad Communications Company (collectively, Joint CLECs); Time Warner Telecom of Colorado LLC (Time Warner); and the Colorado Office of Consumer Counsel (OCC) filed comments.

D. On March 27, 2002 the Commission held a decision meeting. This Decision addresses the remanded issues and the implementation issues. The Decision follows a similar format as previous CPAP orders: a synopsis of the Special Master's recommendation and a synopsis of the decision are given. Next, there is a recitation of the arguments in support of and against the recommendation, and then the Commission's reasoning for accepting or denying the recommendation.

II. INTRODUCTION

A. In this decision the Commission outlines a CPAP that, in its substance and execution, largely tracks the Final Report and Recommendation and the Supplemental Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. This Order modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the CPAP initially recommended by the Special Master and modified by the hearing commissioner in Decision Nos. R01-997-I and R01-1142-I. This final recommended CPAP, embodied in the SGAT language of Attachment A to this Decision, represents this Commission's best effort – with ample input from all parties – to ensure that Qwest performs its interconnection and unbundling obligations under the federal Telecommunications Act of 1996 (the Act) after receiving in-region, interLATA authority under § 271.

C. Based on the Commission's decision with respect to the remand issues, new recommended SGAT language accompanies this Decision as Attachment A. This is the operative SGAT language Qwest must adopt before this Commission will recommend to the Federal Communications Commission (FCC) that it grant Qwest § 271 authority.

III. REMAND ISSUES

A. Requirements For Processes Used To Generate Data Measurement, Collection, And Reporting

1. Supplemental Report and Recommendation (*SR&R at 1-3; 10*)

a. The Special Master recommends a two-prong approach for requirements for Qwest's processes used to generate data measurement, collection, and reporting. If relevant data can be replicated under the old approach (non-fundamental change), then Qwest must note all changes on a public website, the Auditor shall evaluate all changes Qwest made to decide which, if any, should be scrutinized with reconstruction of data. If relevant data cannot be replicated (fundamental change), then before making any fundamental changes: 1) Qwest shall notify the Auditor and request an evaluation of the change; 2) the Auditor will inform the Commission if the change is permissible; 3) the Commission will have 15 days to take action to prevent the change. If no action is taken by the Commission, Qwest shall be allowed to make the change after the 15 day period. If the Auditor concludes the change would be adverse to the integrity of the data, then Qwest would be prohibited from making the change.

b. The Special Master further recommended the applicable penalty when Qwest fails to comply with this provision. If Qwest makes a fundamental change (*i.e.*, data

cannot be replicated) without following the process, then a $100,000 fine would be payable to the Special Fund. If Qwest cannot replicate reliable data, then the Independent Monitor shall use CLEC data to determine applicable payments, interest, and any late payments penalties. If Qwest fails to document changes accurately on the website, then a $2,500 fine for each failure would be payable to the Special Fund.

c. The Special Master suggested that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

2. Decision

a. We accept the Special Master's recommendation on the two-prong approach for fundamental and non-fundamental changes to Qwest's Performance Measurement and Reporting System.

3. Discussion (*Qwest Comments at 2-4. Qwest SGAT §§14.1-14.3 at 13, deleted § 14.3 at 14, and deleted § 18.9 at 24. Joint Comments at 3-6.*)

a. Qwest endorses the Special Master's recommendation with four minor proposed modifications: 1) Qwest has made minor changes to Sections 14.1 and 14.2 to conform the

language that refers to Qwest's Performance Measurement and Reporting System more accurately to describe the processes Qwest uses to collect and report data; 2) Qwest asserts that the Commission should establish a 7-day deadline for the Auditor to act on changes that cannot be replicated; 3) Qwest should have the ability to appeal any decision by the Auditor to disallow the change; and 4) the Commission should make it clear that in the event approval for a change is denied, Qwest should not be liable for any inaccuracies in the data that result from an inability to obtain approval for the change.

b. Qwest also contends that the Special Master clarified that he did not intend to have PIDs and CPAP changes included in the Change Management Plan (CMP). Accordingly, Qwest argues that, references to the CMP in Sections 14.3 and 18.9 should be eliminated. Further, Qwest states that § 18.9 presumes that the parties would obtain pre-approval from an outside source, and therefore should be stricken.

c. The Joint CLECs indicate that they were not clear how the Supplemental Report and Recommendation treats CLEC-affecting changes to Qwest's performance measurement system. They assert that the language proposed in their comments concerning changes to Qwest's data measurement, data collection and data reporting processes is consistent with the Special Master's recommendation.

d. Qwest's proposed language more closely reflects the Special Master's recommendation. We address each of Qwest's four proposed "minor" modifications in turn. We accept Qwest's changes to §§ 14.1 and 14.2. The additional description of Qwest's Performance Measurement and Reporting System will be inserted. This description more accurately describes the underlying programs, tables and calculations used by Qwest in the generation of CPAP reports. This should not be an exclusive list. Therefore, the descriptive list should be preceded by the phrase "defined to include" rather than "defined to be". This allows for the addition of other elements in the future if the need should arise.

e. The March 27 decision meeting revealed the need for clarification in § 14.1. The Special Master recommended that Qwest be allowed to post all changes to its reporting system to a change log on a public website. We now clarify that this website should be easily accessible and dedicated to the CPAP so that CLECs, Office of Consumer Counsel, Commission Staff and other interested parties, including members of the public, will not have trouble locating the information. We suggest a site similar to the Change Management website, located at www.qwest.com/wholesale/cmp. There should be straightforward links to the CPAP monthly performance reports, monthly payment reports, the change log, the Auditor's reports and other CPAP-

related information. There should also be a confidential or password-protected part of this site that contains the CLEC individual monthly reports.

f. We do not accept Qwest's changes to § 14.3 to impose a seven-day turn around time for the Auditor's report on reporting system proposed changes. Without knowing the amount of work that these analyses might include, we will not impose a seven-day deadline for the Auditor's report to the Commission. The time frames for the Auditor's work can be negotiated in the relevant contract.

g. We partially accept Qwest's argument on the right to appeal any Auditor's decision to disallow a change. The Auditor will not be a decision maker under the CPAP. The Auditor will analyze the integrity of the data, and report those findings to the Commission or the Independent Monitor. Therefore, there is no "decision" to appeal. For the purposes of § 14.3, we will allow any interested parties to file comments on the Auditor's report with the Commission no later than seven days into the Commission's 15-day review period. Both the seven day comment period and the Commission's 15-day review period will begin when the Auditor files the report with the Commission and delivers it to Qwest. Further, Qwest shall post the report on the CPAP website immediately after receiving it from the Auditor. This will allow Qwest and other parties the opportunity

timely to file comments on both the proposed change and the Auditor's findings.

h. We do not accept Qwest's fourth proposed change to the Special Master's recommendation. Qwest's language goes too far in prospectively limiting its liability. If circumstances arise in which Qwest claims errors in the data are the result of a disallowed change, these should be dealt with on a individual case basis with Qwest retaining the burden of proving its position.

i. Qwest's comments also indicated that the Special Master clarified that PIDs and CPAP changes should not be included in CMP. We agree with this assertion. Qwest's removal of language in § 14.3 and the last two sentences of § 18.9 is appropriate. The language should be countered with the retention of the first sentence in § 18.9, and the inclusion of language in § 18.6.1, discussed later in the Escalation part of this order. (*See* §§ 14.1, 14.2, 14.3, and 18.9 in Attachments A and B).

B. Regulatory Oversight Over Change Management And CLEC-Affecting Changes

1. Supplemental Report and Recommendation (*SR&R at 3-4*)

a. Changes that affect CLEC access to Qwest's wholesale systems currently result in a $1,000 fine per unapproved change. This "one-size-fits-all" approach is

inadequate. At present, there is no Commission approved change management regime with a definition for and sub-categorization of types of, CLEC-affecting changes. Once the Commission develops and approves a definition and classification regime for CLEC-affecting changes in the Change Management context, the CPAP should be modified accordingly. It should alter the penalty regime set out in § 14.3 to ensure that it is tailored to its dual role in ensuring adherence to the change management rules and compensating CLEC's for any harm fromQwest's failure to do so. The PO-18, GA-7, and PO-16 Performance Indicator Definition (PID) measures and the new payment obligation should not result in more than one payment for the same harm.

2. Decision

a. We accept the Special Master's recommendation on CLEC-affecting changes. Once a tiered definition is agreed to in the Change Management Plan it shall be incorporated into the CPAP. Appropriate penalty levels will be determined and ordered at that time.

3. Discussion (*Qwest Comments at 5-8. Joint Comments at 3-6.*)

a. Qwest does not agree with the Special Master's recommendation on this issue. Qwest asserts that the Special Master's intent to import the CMP process wholesale into the CPAP was never apparent to Qwest and is highly problematic.

The Special Master's recommendation that Qwest should be accountable for further payments than are already in PIDs PO-16, PO-18 and GA-7 (attendant to the CMP) raises several concerns.

b. Qwest opposes any CPAP provision that would hold Qwest financially liable for every obligation in the CMP regime. Instead, Qwest is willing to include obligations to pay affected CLECs $1,000 for missing the initial notification requirement and $250 for subsequent notification requirements for a software release. Qwest asserts, however, that CLECs must be required to demonstrate that they have actually been affected by the failure to issue the notification.

c. Qwest cannot agree to include in the CPAP, provisions providing payment obligations for failure to meet product and process notification obligations. Further, Qwest cannot agree to incorporate these new provisions at the six-month review.

d. The Joint CLECs do not separately discuss this issue in their comments. Rather, the Joint CLECs provided a definition of "CLEC-affecting" in their proposed language for § 14.1 that carries through their interpretation of the Special Master's recommendation on this issue.

e. At the conclusion of this entire § 271 process, there will be only two elements left with which to hold Qwest accountable for non-discriminatory treatment in providing

wholesale and resale services to CLECs. These two elements are the CPAP and the CMP. It follows, therefore, that these two plans overlap in many areas of the carriers' business to business relationships. The CMP covers a broad area of systems, products, and processes that, when changed, affect the way CLECs do business with Qwest. It is logical that Qwest should be held accountable for following the CMP timelines and milestones that it agreed to in the CMP redesign process.

f. The CMP redesign team is currently negotiating a leveled approach for defining CLEC-affecting changes, and the associated processes for notification, comments and implementation. When this task is agreed to and implemented by CMP, Qwest shall file this information with the Commission. The Commission will then propose penalties for each CLEC-affecting level, and allow for comments on those proposed penalties. Once comments are received, the Commission will issue an order establishing both the language to be included in the CPAP and the penalty amount(s) for each level. At that time, Qwest will be required to incorporate the language and penalties into the CPAP and into the monthly reports. Once Qwest receives § 271 approval from the FCC, as with all other penalties and payments, Qwest will be required to begin making payments to affected CLECs for these "misses" as well.

g. We agree with the Special Master that the flat $1,000 fine for unapproved or unnoticed changes that minimally affect CLECs' business is too high. For changes that dramatically affect CLECs' business, the penalty is too low. Without seeing the final outcome from the CMP redesign group, we anticipate penalties ranging from $100 to $10,000 consistent with the commercial import of the change.

h. There is no additional language for the CPAP at this time. We do agree with the deletion of the portion of § 14.3 that currently includes the $1,000 fine for unapproved CLEC-affecting changes. We do not agree to Qwest's proposed changes to PID PO-16.

C. Escalation

1. Supplemental Report and Recommendation (*SR&R at 10-12*)

a. The Special Master recommended that the escalation of payments not be capped at the six month level. He recommended that payments should continue to escalate for the duration of Qwest's out-of-compliance performance.

b. The Special Master recommended that any continuing escalation after 12 months should be contributed entirely to the Special Fund. This, in his opinion, would protect against a windfall for the CLECs.

c. The Special Master suggested, as noted above, that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

d. To the extent that a PID continues to trigger an escalating payment past six months, the Special Master recommended that the Commission automatically examine this measure as part of a six-month review to consider whether the failure to comply reflects continuing deficient performance or some quirk resulting from a poorly defined PID.

e. The Special Master further recommended that, once a payment reaches the nine-month mark, the CPAP should provide for an accelerated step-down method. After at least nine months or more of continuing deficient performance, three consecutive months of acceptable performance should bring the base penalty level to that of the six-month mark. After three more consecutive months of acceptable performance (for a total of six consecutive months of complying performance), the payment level should go back to the base amount.

2. Decision

a. We accept the Special Master's recommendation with the exception of the accelerated step-down process.

3. Discussion (*Qwest Comments at 12-14. Qwest SGAT § 18.6(2) at 22 and §§ 8.2-8.4 at 8. Joint Comments at 16-18. OCC Comments at 10.*)

a. Qwest continues to believe and make arguments that the six-month cap, modeled on the Texas Plan, lies well within the zone of reasonableness established by the FCC for its review of such plans. According to Qwest, the proposed changes by the Special Master would mitigate to some extent, Qwest's concerns about the financial liability associated with unending escalation in payments. Qwest's claims the Supplemental Report does not address head-on what should be done when non-conforming results are caused by PID design rather than a lack of incentive on Qwest's part. If payments are allowed to escalate, Qwest argues, the escalation should be included in the 10% collar endorsed by the Special Master in his recommendation on Changeability.

b. Qwest's proposed language for §§ 18.6 (2), 8.2, 8.3, and 8.4 includes Qwest's retention of a six-month maximum multiplier, the accelerated step down approach, the payment of 100% to the Special Fund after the 12 month

multiplier and the inclusion of the escalated payments beyond the sixth month to be included in the 10% financial collar.

c. The Joint CLECs do not agree that the escalated payments would lead to a windfall beyond the 12-month multiplier. If the PIDs are sufficient to determine if Qwest has met the requirement of the Act, they should also be sufficient to determine if Qwest continues to do so after § 271 entry is granted.

d. The Joint CLECs' position on the Special Master's accelerated step-down is that, it is too precipitous a step-down. For instance, if Qwest has missed a measure bringing them to the 14 month mark and then subsequently has three months of compliance, Qwest would drop all the way back to the six-month mark. Also, the Joint CLECs assert that the SGAT language needs to be more clear that when Qwest is stepped down to the six-month mark, but then is out of compliance again, the escalation process would continue upward for each miss and that Qwest is only eligible for the accelerated step down again after the nine-month mark with three consecutive months of compliance.

e. The Joint CLECs, while they do not necessarily agree with it, have proposed language that mirrors the Special Master's recommendation on escalation.

f. The Office of Consumer Counsel commented on the Escalation issue as well. It states that the OCC continues

to support the escalation of payments clause as ordered by the hearing commissioner. However, the Special Master's recommendation to require a review of escalated payments for six-month reviews and escalated step down procedure is a reasonable compromise to which the OCC has no objection.

g. We accept the Joint CLECs' proposed language for §§ 18.6.1, 8.2 and 8.3 with some minor modifications. We reject the accelerated step-down process.

h. We are exasperated by Qwest's attempt once again to include a six-month cap on the escalation of payments, even with the concessions offered by the Special Master. We do not agree with Qwest that a six-month cap on escalation is reasonable, nor do we agree that the Special Master's recommendation does not address what should be done when non-conforming results are caused by PID design rather than Qwest's lack of incentive.

i. The Special Master has recommended that new PIDs should be introduced through a collaborative forum before bringing those PIDs to the Commission for incorporation into the CPAP. In addition, he states that the preferred approach should be to introduce these PIDs as diagnostic for some time to allow for the reporting of actual data before determining the relevant standard and penalties. This language, inserted in § 18.6.1,

should minimize the likelihood of poor PID design resulting in many months of escalated payments.

j. As for existing PIDs, already agreed to, fully audited, measured, and reported at the Regional Oversight Committee (ROC), we fail to see how Qwest will be able to pass the ROC-Operation Support System (OSS) test, given that it is a military style (*i.e.,* pass or retest) test, if there are these "poorly defined" measures for which Qwest continues to be non-compliant. However, if this happens to be the case, Qwest will be able to argue at the first six-month review for the removal or change of these PIDs since the CPAP language will require, in § 18.6.1:

> If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed pursuant to this Section, in order to determine if there are issues with that PID, such as poor definition, that need to be addressed.

k. In our review of the accelerated step-down process recommended by the Special Master, we became increasingly aware from the Joint CLECs' comments, as well as our own Staff's input, that the practical implementation and tracking of such a process would be arduous at best. The current step-down process, without any acceleration, already has the possibilities of step-downs, step-ups, and maintenance of the status quo depending on Qwest's performance in the instant month

and some numbers of previous months for each and every performance measurement for each and every CLEC. The accelerated step-down process would multiply, and complicate, this tracking work. In keeping with the goal of having this Plan be as self-executing and easy to understand as possible, we decline to accept the accelerated step-down process as part of the CPAP.

l. We accept the Special Master's recommendation that if the escalation payments for a particular submeasure continue for more than 12 months, the escalation payments owed to the CLEC will be fixed at 50% of the 12 month payment. This fixed amount will continue until Qwest's satisfactory performance for the submeasure, results in Qwest paying at the 11 month level. At that point, the process in § 8.2 (the step-down process) will apply. All amounts in excess of the CLEC payments for month 12, will be paid to the Special Fund. The Special Master's original Report and Recommendation dated June 8, 2002, noted:

> In an ideal world, the Tier I.X payments should be calibrated to reflect the actual market harm and not simply a very rough basis upon which to award payments. The current state of the record in this proceeding, however, provides no reasonable basis to approximate the actual market harm to companies that suffer deficient performance. Unfortunately, no parties have carefully documented the payments necessary to address different types of harms (such as these examples) and thus the Tier I.X payments reflect merely a very rough and unrefined approximation of what compensation is owed.

The state of the record has not changed since the Special Master made his observation. With no better idea of commercial harm, we cannot even begin to speculate on the appropriate penalty level.

m. At the 12-month point, an affected CLEC will receive $1,350 for a miss of a Tier 1A submeasure. (The other $1,350 will be paid to the Special Fund). It seems likely that this $1,350 covers actual costs of the CLEC for Qwest's failure to perform and most likely, some punitive damages as well. By continuing Qwest's payment responsibility under § 8.2 and just shifting who actually receives the money, Qwest will still have the incentive to fix the problem rather than let it continue.

n. At month 13 and after, the CLEC affected by these escalated misses will still receive 50% of the 12 month payment. It is only the additional 13+-month penalty amounts that will be paid entirely to the Special Fund. For instance, if Qwest has missed a Tier 1A measure for 13 months consecutively (not counting any severity multiplier), an affected CLEC would receive $1,350 in month 13 and the Special Fund would receive $1,350 plus $225, or $1,575. In month 14 the CLEC would receive $1,350, and the Special Fund would receive $1,575 plus $225, or $1,800; and so on.

o. There are several sections throughout the CPAP that refer to the escalation payments as 50% to the CLECs and 50% to the Special Fund. These sections have been changed in

Attachments A and B to reflect the above decision. (*See* Attachments A and B §§ 2.1, 8.3, 10.2, 10.4 and 16.5.)

D. Special Access

1. Supplemental Report and Recommendation (*SR&R at 12-17*)

a. The Special Master recommends that the Commission define the type of special access circuits that would be eligible for monitoring and reporting as either: 1) those used primarily for local services or 2) those used to a nontrivial degree (*e.g.*, 10% for local service).

b. Qwest needs to develop the capability to measure its performance on the relevant pre-ordering, ordering, provisioning, and maintenance and repair functions for special access circuits. Therefore, according to the Special Master the Commission should set forth the scope of any measurement and reporting obligations imposed on Qwest. The relevant set of measures are: PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, and MR-8. Also, PIDs PO-5 and PO-9 are relevant measures, unless there is a compelling reason for not doing so. A previous CPAP decision (Decision No. R01-997-I) required Qwest to monitor and report special access services for PIDs OP-8, MR-3, and MR-9. The requirement to measure these should be eliminated because they are not appropriate measures of special access.

c. There are two ways to identify monitored special access circuits: 1) the use of a project field (this would have to be made available in both Qwest's ordering and maintenance and repair systems and the CLECs would need to be responsible for entering the relevant field into both the ordering system and the maintenance and repair system,) or 2) the use of different Access Carrier Name Abbreviation (ACNA) codes to classify use of special circuits as either long distance or local.

d. It is conceivable that the terms for monitoring and reporting on special access circuits will be resolved through business-to-business negotiations. If an agreement is negotiated and is submitted to the Commission, the Special Master recommends that the Commission should determine if that business-to-business agreement has substantially addressed the concerns raised by CLECs, such that there is no need to measure special access services.

e. If a business-to-business agreement is not submitted, the Special Master recommends that the Commission should ask for a joint (Qwest and CLECs) submission of an implementation plan or that the Commission should engage in baseball-style arbitration so that an implementation plan can be adopted.

2. Decision

a. We reject the recommendation to ask for a joint submission of an implementation plan. We also reject the recommendation that the Commission should engage in baseball-style arbitration. Instead, the Commission shall require Qwest to develop the capability to measure and to begin monitoring its performance for special access circuits by use of the project field within 60 days of the mailed date of this order. It is also acceptable if a CLEC and Qwest agree to the use of an ACNA code as long as the CLEC and Qwest also agree to a date certain to develop the capability to measure and to begin monitoring special access circuits through use of the ACNA code.

b. By entering the project field into Qwest's provisioning system or maintenance and repair system, CLECs would be self-certifying that the special access circuit is used for local service.

c. Qwest shall monitor and report special access circuit performance for PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, MR-8, and PO-5[1]. The standard shall be diagnostic. Qwest shall take only the exclusions listed in the PID for each measure.

[1] We shall not require monitoring and reporting of special access circuits for PO-9. *See* discussion for EELs.

d. Reports shall be delivered by Qwest to each individual CLEC, the Commission, and the Office of Consumer Counsel at the same time and by the same method it delivers performance reports for the CPAP measures pursuant to § 13.2.

3. Discussion (*Qwest Comments at 14-19. Joint Comments at 18-21. Time Warner Comments at 3-6.*)

a. In order for meaningful assessment of special access circuit performance, Qwest argues that, the standard should be at least 33% local usage.

b. Qwest asserts that the use of the project field method would not allow CLECs to designate when a special access circuit is used by a CLEC in lieu of a UNE. Qwest opposes the ACNA code method because it would require each CLEC to have a separate ACNA code to distinguish special access circuits. According to Qwest, these separate ACNA codes would have to be assigned through Telcordia Practice. Further, Qwest would have to make system changes that could take 90 days or more. Qwest argues that it would not be reasonable to expect it to go back and assign different ACNA codes to the over 306,000 special access circuits installed in Colorado.

c. Qwest contends that, for contractual reasons, there is no opportunity to negotiate a business-to-business agreement. Qwest states it is willing to participate in an informal investigation to determine the need for, and

structure for reporting, information on special access provisioning. As a prerequisite, however, Qwest contends that the CLECs should be required to establish factual predicates about the need for special access measures and their ability to verify the local usage on their special access orders.

d. The Joint CLECs favor the broader (non-trivial) local usage standard suggested by the Special Master. However, AT&T and WorldCom recommend that the Commission adopt a standard specifying that any amount of local traffic would qualify a CLEC's special access order for monitoring of Qwest's performance because exact percentages of local usage cannot currently be determined.

e. The Joint CLECs agree with the Special Master's recommendations on which measures should be designated for special access circuit performance.

f. The Joint CLECs assert that the Commission does not need to choose one of the two methods: project field or ACNA code, for identifying which special access circuits should be subject to monitoring. The Joint CLECs explain that the industry practice of reaching mutual agreement to modify the Access Service Request (ASR) format would apply here. The Joint CLECs prefer the ACNA code method but would not want it imposed on any CLEC which prefers the project field method.

g. The Joint CLECs disagree with the Special Master's suggestion that implementation details be the subject of additional filings or baseball-style arbitration before the Commission. The Joint CLECs are skeptical that business-to business negotiations might take place because of Qwest's position on EEL conversion.

h. Time Warner favors the broader (non-trivial) local usage standard suggested by the Special Master.

i. Time Warner agrees that PIDs OP-8, MR-3, and MR-9 are not relevant special access measures. Time Warner further agrees with the Special Master's recommendation on relevant special access measures.

j. Time Warner recommends adoption of the project field method because it does not use multiple ACNA codes for its business. Alternatively, Time Warner suggests the Commission could permit CLECs to use either the project field or different ACNA codes.

k. Time Warner does not believe that additional implementation details should be the subject of more filings by parties or be subject to baseball-type arbitration.

l. The comments suggest that the Commission should not expect any business-to-business agreements to be presented to it. The comments imply that it would not be productive for the Commission to subject the parties to

additional process such as joint submission or baseball-style arbitration. Qwest's suggestion that an informal investigation be conducted to determine the need for, and structure of reporting information on special access provisioning ignores that the special access issue was remanded for the limited but specific purpose of devising solutions for monitoring Qwest's special access services performance. We find that the record contains sufficient information to resolve this issue, as set forth in the above decision.

E. Changeability: Review Processes

The Special Master's recommendations for changeability are separated into three areas: 1) review processes, 2) financial collar, and 3) Commission authority and Qwest's right to judicial review.

1. Supplemental Report and Recommendation (*SR&R at 17-22*)

a. Regarding review processes, the Special Master recommends that the core aspects of the CPAP should be fixed until the three-year review. Therefore, the basic framework subjects that should be off-the-table for six-month reviews are:

- statistical methodology;
- rules regarding the cap (financial collar);
- duration of the CPAP;
- payment regime structure (tiers, base amounts, payment escalation, payment severity, and specified payment and fine amounts);
- legal operation of the CPAP;
- Independent Monitor's operation; and,

- ?? any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory wholesale performance.

Subjects on-the-table at six-month reviews are:

- ?? variance tables may be added for new Tier 1A measures (to the extent possible, new variance tables should follow the method used to create existing variance tables);
- ?? payment amounts may be added for new Tier 2 measures;
- ?? payment amounts may be added for violations of change management requirements (each level would need to be defined and assigned); and,
- ?? the Independent Monitor function may be assigned to an ALJ.

Any subject not deemed "off-the-table" is fair game at the six-month review.

b. The Special Master also recommends that the basic framework of the CPAP, as well as refinement of the payment amounts in order to bring them into line with any evidence of the actual marketplace harm that results from deficient performance, should be revisited at the three-year review and six-year review.

c. The Special Master recommends participating in a region-wide or multi-state forum for maintaining (*i.e.*, modifying, adding, deleting) PIDs after the end of the ROC-OSS test. If the Commission elects to participate in such a forum, he also recommends using monies from the Special Fund to contribute to any administrative costs of such a forum.

d. The Special Master finally recommends the Commission clarify its intent with respect to the six-year review and termination of the CPAP.

2. Decision

a. We accept the Special Master's recommendations on review processes. Core aspects of the CPAP shall be off-the-table at six-month reviews and shall remain fixed until the three-year and six-year reviews.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest raises concerns that the Special Master's use of "presumptively" to describe off-the-table subjects could allow for changes. Qwest asserts that the off-the-table subject of "any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory performance" should not be construed to mean that payment issues would be back on the table. However, Qwest wants the escalation payment limitation to be on-the-table, as an exception to this subject. Qwest asserts subjects that are on-the-table for six-month reviews should be clearly defined and has proposed language for § 18.4 to indicate Staff's report to the Commission is limited the issues that are "clearly" defined in its proposed § 18.6.

b. Qwest argues that the CPAP must require parity standards for measurements for which there is a retail comparative. Qwest proposes language for § 18.6(1) reflecting this.

c. Qwest asserts that the only legitimate provisions that should remain in effect after the six-year review are the Tier 1A payment provisions. Qwest proposed revisions to § 18.10 to clarify this.

d. Qwest argues that a portion of § 7.5, a portion of § 10.6 and all of § 16.9 must be deleted to reflect the changeability recommendations of the Special Master.

e. The Joint CLECs contend that their proposed language changes to §§ 18.6 and 18.7 reflect the Special Master's recommendations on changeability of the CPAP.

f. The OCC does not object to "off-the-table" items being removed from the six-month reviews as long as these items are clearly on-the-table for the three-year review.

g. The OCC supports explicit Commission authority to continue or sunset the plan in its entirety, or to maintain certain aspects of the plan and sunset others. The OCC proposed replacement language for § 18.11.

h. The Joint CLECs' proposed language better captures the recommendations of the Special Master. However, the Joint CLECs do not offer language on the specified

exceptions for the six-month review. We adopt the Joint CLECs' language with the addition of the specified exception language and some minor modifications (*see* §§ 18.6 and 18.7 in Attachments A and B). We accept Qwest's proposal to delete § 18.8 and part of § 18.9 (*see* §§ 18.8 and 18.9 in Attachments A and B). We deny Qwest's proposal to delete portions of §§ 7.5 and 10.6 and to delete all of § 16.9. We disagree with Qwest's argument that these changes reflect the Special Master's recommendations on changeability.

i. We concur with the Special Master's recommendation on participation in a multi-state forum for maintaining PIDs after the end of the ROC-OSS test. Section 18.6.1 reflects our concurrence. We are not opposed to using monies from the Special Fund to contribute to any administrative costs of such a forum. However, until the details of a collaborative forum have been worked out, the CPAP shall not include language designating that the Special Fund shall be used to fund the collaborative forum administrative costs.

j. To clarify the Commission's intent with respect to the six-year review and termination of the CPAP, Section 18.11 shall be modified to clarify the sunset of the CPAP. Tier 1A will continue until further order of the Commission. All provisions of the CPAP not related to

continuing the Tier 1A regime will sunset at the end of six years, unless the Commission orders otherwise.

(*See* § 18.11 in Attachments A and B.)

F. Changeability: Financial Collar

1. Supplemental Report and Recommendation (*SR&R at 4-10*)

a. The Special Master recommends that the CPAP include a financial collar of 10 percent to be implemented as follows:

- ?? requires Qwest to calculate separately the payments owed by it under the CPAP that was in effect before changes made at a six-month review;
- ?? requires Qwest to calculate the payments owed by it under the revised CPAP;
- ?? authorizes Qwest to scale down the payments to the affected CLECs and to the Special Fund if the revised CPAP would require more than a 10% increase in total payments;
- ?? requires "above the collar" payments to be made from the Special Fund to any CLEC affected by this mitigation of payments;
- ?? if the revised CPAP calls for total payments above the collar, then requires the unchanged CPAP be used as the benchmark for purposes of setting a collar for the next six-month period;
- ?? if the revised CPAP calls for total payments below the collar, then requires the revised be used as the benchmark for setting a collar for the next six-month period.

2. Decision

a. We accept the recommendation to add a 10 percent financial collar.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest contends that its proposed language for § 18.8 reflects the recommendation of the Special Master for the financial collar. The Joint CLECs likewise assert that their proposed language for §§ 18.7.2, 18.7.3, and 18.7.4 reflect the recommendation for the financial collar.

b. Both sets of proposed language reflect the recommendation for the financial collar. We adopt Qwest's proposed language with some modifications because the language is clearer on the calculation and application of the financial collar. We shall add to it language proposed by the Joint CLECs stating:

> If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities.

(*See* § 18.8 in Attachments A and B.) This additional language better reflects the Special Master's intent to use the Special Fund for mitigation of payments to any affected CLEC, while limiting Qwest's liability in a given year.

G. Changeability: Commission Authority And Qwest's Right To Judicial Review

1. Supplemental Report and Recommendation (*SR&R at 4-10*)

a. According to the Special Master, Qwest's filing of the CPAP sets forth the framework that empowers the Commission to enforce and to modify its terms. Qwest cannot later challenge the terms of its initial filing. Nevertheless, the initial CPAP does not waive later as to challenges by Qwest related to subsequent changes to the CPAP.

b. The Special Master recommends that, if the Commission orders a change on completion of a six-month review of an off-the-table subject without Qwest's consent, the effect of any such change should be automatically stayed during the course of any judicial challenge to the Commission's order. The Special Master states that, at the three-year review, the Commission will not be able to require Qwest to undertake any new obligations. Rather, the Commission will be able to give Qwest the option of filing the new, recommended regime or of keeping the old regime. If Qwest opts not to file the new regime, the Commission can order it (or any aspect of it), subject to judicial review. The Special Master recommends that this order of the Commission not be automatically stayed.

2. Decision

a. The Commission accepts the Special Master's recommendation regarding the automatic stay during any judicial challenges of changes ordered by the Commission at the completion of a six-month review to off-the-table subjects. The Commission agrees with the Special Master that an order requiring changes to the CPAP on completion of the three-year review should not be automatically stayed. The Commission disagrees with the Special Master with respect to treatment of Commission-ordered changes to the CPAP at the three-year review.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest proposes language for § 18.5 that indicates that the Commission must commence a proceeding or hearing to resolve disputed issues. Qwest asserts this requirement would preserve a record on appeal.

b. Qwest asserts that the CPAP should clearly state that the Commission cannot order changes to the CPAP that are directly related to measuring and/or providing payments for non-discriminatory performance that are not required under § 251 of the Act. Qwest argues that this category is acceptable if it does not include the words "and/or providing payments" and with the clarification that the category is dependent upon the

requirements of § 251. Qwest proposes language in § 18.6(3) reflecting this.

c. Qwest proposes addition to § 18.6 of a general reservation of rights provision to provide assurance that Qwest is not subject to a claim of waiver upon appeal at the six-month review.

d. Qwest agrees with the recommendation automatically to stay during judicial review changes to off-the-table subjects ordered by the Commission upon completion of a six-month review. The language proposed by Qwest for § 18.7 reflects this agreement. Qwest disagrees with the Special Master that there should not be an automatic stay of changes ordered by the Commission after completion of a three-year review. The language proposed by Qwest for § 18.9 reflects this disagreement.

e. Qwest argues that all changes that are approved upon appeal should be limited to the 10% financial collar. Qwest proposes language for §§ 18.7 and 18.9 reflecting this.

f. The Joint CLECs contend that their proposed language changes for §§ 18.7.1 and 18.10 reflect the Special Master's recommendations.

g. The OCC objects if the Special Master's recommendation is that the CPAP contain no explicit authority

for the Commission to impose new obligations at the three-year review. According to the OCC, the current CPAP provides that payment amounts can be revised and that the basic framework of the CPAP can be modified at the three-year review. The OCC asserts that this language gives the Commission authority to impose new obligations at that time.

h. The Commission adopts the Special Master's recommendation concerning the automatic stay of a Commission decision, arising from a six-month review, which changes an off-the-table aspect of the CPAP. Because the Commission's authority here is a *sui generis* mixture of federal and state authority, the automatic stay provision provides a reasonable brake on the Commission's authority. The netherworld of state commission exercise of federal remedial authority should not be used indiscriminately to ratchet a performance regime. The stay provision is limited in scope, duration and purpose. An automatic stay should be invoked rarely, if ever, yet provides valuable assurance that the limits contained in Section 18.7 will be observed. The provision implements, and gives effect to, specific contract language (*i.e.,* Section 18.7) which limits the areas which can be changed at a six-month review. If the Commission determines that it will change an off-the-table area notwithstanding Section 18.7, the automatic stay is an appropriate constraint, particularly because it will not be

invoked unless there is judicial review of the Commission's decision. In permitting the automatic stay provision, we emphasize in the strongest possible terms that a provision of this type is not appropriate or reasonable in any other setting or circumstance. This process is *sui generis,* and so is the automatic stay provision. We do not expect to see, and will not approve, an automatic stay provision in any other situation (*see* § 18.7.1 in Attachments A and B).

i. We now turn to the Special Master's recommendation concerning the procedure to be used following a three-year review and to Qwest's proposal for an automatic stay of an order, arising from a three-year review, which changes the CPAP. We adopt neither the Special Master's suggested process nor Qwest's requested automatic stay. In our view, a Commission order arising from the three-year review is just that, a Commission order. As with any other Commission order, Qwest or any other party can accept the order or can institute a judicial review action. There are established processes for obtaining a stay of a Commission order when judicial review is sought. Thus, we find that the Special Master's recommendation adds an unnecessary element of process. Further, at the three-year review, all aspects of the CPAP can be reviewed and changed. This distinguishes the three-year review (which has no limit on what can be changed) from the six-month review (which has such a

limit) and supports our conclusion that an automatic stay of a three-year review order is neither appropriate nor reasonable (*see* § 18.10 in Attachments A and B).

IV. ASSORTED IMPLEMENTATION ISSUES

A. Variance Factors And The One Free Miss Rule, Missing Variance Factors, And Other Variance Issues

1. Supplemental Report and Recommendation (*SR&R at 4-6*)

a. The Special Master recommends that the current variance table be changed because it uses two rules where one would do. The current table includes lower than otherwise appropriate variance amounts on the understanding that Qwest was permitted "one free miss" before it would be required to pay CLECs for deficient performance. The "one free miss" rule makes sense for performance measures that rely on a benchmark to set the standard for performance, but is redundant for parity measures where the variable table itself provides for the necessary "slack factor." The Commission should remove the one free miss rule from the CPAP, and from its use in Tier 1A, Tier 1B and Tier 1C, except where used in association with performance measures in which a benchmark sets the standard. The variance table should be adjusted to reflect this change.

b. The Special Master goes on to say that this variance table method is not a perfect step. To address the lack

of dynamism in this method, he recommends that the Plan include a provision that uses for a "shadow method" of calculation of payments for small sample sizes (i.e., 1-30) based on the permutation test in Tier 1B. In practice, this means that the CLECs will be provided with the results calculated using both the variance factor method and the shadow method, and will receive payments based on whichever one is more beneficial to them.

c. During the course of meetings with Qwest and other parties on these remand issues, the Special Master learned of certain variance factors that were missing for several parity measures contained in Tier 1A. For the long term, he recommends that, where a variance factor has yet to be calculated or where there are not sufficient data to use in developing one, the relevant Tier 1A measures should rely on the same statistical methodology used for Tier 1B and Tier 1C (that is contained in §§ 4 and 5 of the Plan). For the short term, he recommends additions for these known missing factors.

d. Finally, in a step to guard against the lack of predictability for Qwest that results from these changes, § 10.3, which governs the special severity for Tier 1A, should be amended to provide for payments on the lower of the amount generated by the old variance factor method (with the one free

miss rule) and the new variance factor method as set forth in his recommendation.

2. Decision

a. We accept the Special Master's recommendations as to the variance factors.

3. Discussion (*Qwest Comments at 8-9. Qwest SGAT §§ 6.2 and 6.4 at 5, Table 2 at 4-5, and § 10.3 at 9. Joint Comments at 6-10.*)

a. Qwest's language for §§ 6.2 and 6.4 and Table 2 conforms with the Special Master's recommendations and is accepted with minor modifications for clarification as contained in Attachments A and B.

b. The Joint CLECs agree with the Special Master's recommendations as well, but their proposed language does not follow the recommendation as clearly as Qwest's, with the exception of § 10.3.

c. In Qwest's comments on § 10.3, Qwest asserts that the Special Master inadvertently referred only to Tier 1A measures here, and should have included Tier 1B measures. Qwest has provided language that refers to both.

d. The Joint CLECs do not make this assertion nor do they include Tier 1B in their proposed language for this section.

e. We agree with the Joint CLECs, and will use their proposed language with minor modifications for this

section. The inclusion of Tier 1B in this new comparison method of the old variance factor table and the new table makes no sense. The variance factors are only used in the CPAP's statistical methodology for Tier 1A measures and, therefore, Tier 1B measures should not be included in this new method for comparison of variance tables (*see* § 10.3 in Attachments A and B).

B. Language Clarification

1. Supplemental Report and Recommendation (*SR&R at 7-8*)

a. The Special Master makes several recommendations regarding language clarifications through out the CPAP. These recommended changes are to §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.

2. Decision

a. We accept the Special Master's recommended changes to all these CPAP sections. (*See* Attachments A and B at §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.)

3. Discussion (*Qwest Comments at 9. Qwest SGAT § 4.2 at 1, § 5.2 at 3, § 6.1 at 3, § 6.3 at 5, § 7.1 at 5-6, and § 13.6 at 12. Joint Comments at 10-11.*)

a. No party objects to the recommended changes of the Special Master for this clarifying language. Qwest provided proposed language in its comments that conforms to the recommendations. In §§ 6.3 and 7.1 Qwest adds clarifying phrases

for reference to the Special Master's recommendations. We accept these additions.

b. In its proposed language for § 13.6, Qwest adds the sentence:

> If an audit is in progress, Qwest is not precluded from revising the reported data without incurring the payments required by Sections 13.4 and 13.5 if the audit is focused on a different area of performance measurement.

We do not agree with this addition. This language confuses the understanding of the section and will not be allowed.

C. Computation Issue Regarding Zone 1 And Zone 2

1. Supplemental Report and Recommendation (*SR&R at 8-9*)

a. The Special Master recommends that the CPAP follow the suggestion of the rural-based CLECs and the model set out in the multi-state PAP, that is: combine zone 1 and zone 2 for purposes of statistical testing. Specifically, he recommends adding the following sentence to the last paragraph of § 4.3:

> When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

He also recommends deleting the last sentence of § 5.1 and modifying § 7.5 as follows:

> For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified. For purposes of statistical

comparison and occurrence calculation, a measure shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest SGAT § 4.3 at 5, § 5.1 at 3, and § 7.5 at 7. Joint Comments at 11.*)

a. Qwest's proposed SGAT language agrees with the recommendation, except for the addition of the word "these" in § 4.3. The Joint CLECs believe that the sentence recommended for addition to the last paragraph of § 4.3 should instead be added to the last paragraph of § 4.2.

b. In earlier efforts to clarify language on this matter it seems the language added to § 7.5 was inconsistent with language included in § 5.1. We correct that inconsistency now. We disagree with the CLECs that the additional sentence be added to the last paragraph of § 4.2. Section 4.3 deals with sample sizes smaller than 30, and § 4.2 deals with sample sizes greater than or equal to 30. Because this combination "follows the suggestion of rural-based carriers," we conclude that the sentence should be added to § 4.3. (*See* §§ 4.3, 5.1, and 7.5 in Attachments A and B).

D. Unnecessary Measures

1. Supplemental Report and Recommendation (*SR&R at 9*)

a. The Special Master recommends that PIDs PO-3A-2 and PO-3B-2 be excluded from the CPAP because these measures are calculated and reported on a 14-state basis.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest SGAT Appendix A at 33.*)

a. No party objects to the recommended exclusion. PIDs PO-3A-2 and PO-3B-2 will be deleted from Appendix A of the recommended SGAT language.

E. Establishment Of The Special Fund

1. Supplemental Report and Recommendation (*SR&R at 9*)

a. The Special Master recommends that the Commission designate a specific employee to direct Qwest how to manage the escrow fund set up for this purpose.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest Comments at 10. Qwest SGAT § 10.4 at 9.*)

a. Qwest agrees with the Special Master and recommends that the administration of the Special Fund should be addressed in a Memorandum of Understanding (MOU) that would include provisions for auditing the disbursement process and payment of expenses and taxes from the fund. Qwest proposes language for addition to § 10.4 reflecting its recommendation.

b. The Commission and Qwest shall enter into a MOU for administration of the Special Fund which shall identify: individuals authorized access to the account; disbursement and auditing procedures; provisions for fund expenses and tax liabilities to be paid from fund assets; and other provisions necessary for administration and operation of the fund. The CPAP will be part of a contract between Qwest and a CLEC, not Qwest and the Commission. Therefore, we reject Qwest's proposal to add language to the CPAP to reflect this. Once the MOU is negotiated and signed by representatives of Qwest and the Commission, it will be a public document available for the CLECs and any other interested party to review.

F. Miscellaneous Administrative Issues

1. Supplemental Report and Recommendation (*SR&R at 9-10*)

a. With respect to reports listing CLEC-specific performance results, the Special Master recommends that

the Commission order Qwest to file such reports upon request by Commission Staff so that Qwest can share information with the Staff that would otherwise be confidential and proprietary to the individual CLECs.

b. With respect to the reporting of necessary payments, the Special Master recommends that Qwest be permitted to provide CLECs with this information via secure websites. He recommends changing § 13.2 as follows:

> Qwest shall deliver the individual monthly report to the Commission and the Office of Consumer Counsel ~~via email~~ by posting the CLEC results to a secure website and posting the aggregate results to the Qwest wholesale website on or before the last business day of each month following the relevant performance period.

c. The Special Master recommends that Qwest be authorized to use wire transfers, as opposed to checks, to make disbursements when so directed by the Commission.

2. Decision

a. We accept the Special Master's recommendation in concept, but change the language in §§ 12.2 and 13.2 to align more clearly with the Commission's filing requirements and to allow for more protection to the CLECs in the disbursement of payments.

3. Discussion (*Qwest SGAT § 13.2 at 11 and § 12.2 at 11. Joint Comments at 11-15.*)

a. Qwest's proposed language for § 13.2 allows for the posting of the CLEC-specific results to a secure website and of the aggregate results to the Qwest Wholesale Website, as recommended by the Special Master.

b. The Joint CLECs propose additional language that includes a recitation of part of our rule on confidentiality, 4 CCR 723-16. We do not believe this citation is necessary for the CPAP. The reports shall be filed and treated in accordance with the Commission's procedures concerning confidential and proprietary data unless an individual CLEC agrees in writing, filed with the Commission, that reports concerning it are not confidential. No further protection, beyond that already provided by Commission rule, is necessary.

c. Section 13.2 will be changed to state that Qwest is required to file with the Commission "one hard copy and one electronic copy in an Excel format of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file." This will afford Staff of the Commission, the Independent Monitor, and the Auditor access to the report data in a format that can be used for further analysis. The

Commission will establish a docket in which all CPAP-related filings will be made (*see* § 13.2 in Attachments A and B).

d. As recommended by the Special Master, § 12.2 should allow Qwest the opportunity to make cash disbursements to CLECs and the Special Fund through the means of electronic transfers. We agree with this option, and require additional language be included in this section to give the CLECs some protection from potential discriminatory treatment. The pertinent part of § 12.2 should read as follows:

> However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC.

(*See* § 12.2 in Attachments A and B).

G. Legal Operation Of The CPAP

1. Supplemental Report and Recommendation (*SR&R at 11*)

a. The Special Master recommends that § 16.6 be changed to state that Tier 1X "and Tier 1Y" payments to a CLEC are in the nature of liquidated damages. As now written, there is no mention of Tier 1Y payments. The Special Master also recommends that § 16.7 be clarified to state that only the relevant finder-of-fact can judge what amount, if any, of payments under the CPAP should be offset from any judgment in favor of a CLEC in a related action.

2. Decision

a. We accept the Special Master's recommendation. We adopt Qwest's proposed language for § 16.6. We adopt the Joint CLECs' proposed language for § 16.7.

3. Discussion (*Qwest Comments at 10-11. Joint Comments at 15.*)

a. Qwest agrees with the recommendation and proposes language to specify Tier 1Y payments in § 16.6. Qwest notes that § 16.6, which is expressly directed to the mechanism for seeking approval for CLEC recovery of contractual damages, contains a requirement to offset payments to CLECs. Qwest further notes that § 16.7 refers to a different offset. According to Qwest, this is intended to address non-contractual recovery by the CLEC for the same harm for which it received payments under the CPAP. Qwest has proposed language be added to § 16.7 as follows:

> With respect to contractual damages sought pursuant to Section 16.6, CLEC must offset any award with any payments made under this CPAP.

b. The Joint CLECs contend the language they propose for §§ 16.6 and 16.7 captures the intent of the Special Master.

c. We conclude that Qwest's proposed language for § 16.6 captures the Special Master's recommendation and is satisfactory. The language proposed by Qwest for § 16.7,

however, is in consistent with the Special Master's recommendation. The Joint CLECs' language for § 16.7 is acceptable because it captures the Special Master's recommendation.

H. Addition Of New Measures For EELS

1. Supplemental Report and Recommendation (*SR&R at 10*)

a. The Special Master recommends that the CPAP be revised in the near future to include obligations related to Enhanced Extended Loop (EEL). Specifically, the following submeasures, for which Qwest currently is measuring and reporting EELs, should be added to the CPAP: PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, and MR-8. He further recommends that Qwest should also be required to include submeasures for pre-order activities for EELs by measuring and reporting EELs for PIDs PO-5 and PO-9, unless Qwest provides a compelling reason not to do so. The EEL submeasures should be included as Tier 1A. The statistical methodology that contemplated for loops in Sections 4 and 5 could be used for EEL submeasures until a set of variance factors can be developed for the EEL submeasures.

2. Decision

a. We accept the recommendation. Submeasures for EELs should be considered for addition to the CPAP at the

first six-month review. The Commission prefers, to the extent possible, that Qwest develop variance factor tables for the EEL submeasures for consideration at the first six-month review.

3. Discussion (*Qwest Comments at 11.*)

a. Qwest contends that EEL disaggregation for PID PO-5, Firm Order Confirmations (FOCs) on Time, should be added at the six-month review, because the measurement needs to be developed and a standard needs to be identified. Qwest estimates the development work will take three to four months. Qwest commits to beginning the development process with a goal of producing data for use at the six-month review.

b. Qwest argues that EEL disaggregation for PID PO-9, Timely Jeopardy Notices, should not be added. Qwest asserts that the two-way communication (between a CLEC and Qwest) associated with the provisioning of such designed services takes the place of the jeopardy notice.

c. The Commission acknowledges and approves of Qwest's willingness to undertake development to disaggregate PID PO-5 for EELs and to begin producing data to be considered at the first six-month review. We accept Qwest's reasoning for not disaggregating PID PO-9 for EELs and shall not require this disaggregation at this time.

I. Other

1. Qwest Request to Address Possibility of Federal Wholesale Service Quality Rules (*Qwest Comments at 11-12)*

a. As framed by Qwest, the issue is whether the CPAP needs to recognize, and to take into account, the FCC's wholesale service quality rules and remedies to avoid Qwest's having to pay both CPAP payments and remedies under federal rules.

2. Decision

a. The Commission denies Qwest's proposal to add language to the CPAP to account for federal wholesale service quality rules because no such rules have been promulgated by the FCC.

3. Discussion (*Qwest Comments at 11-12. Qwest SGAT § 16.4 at 17-18.*)

a. This issue was not addressed in the Special Master's Supplemental Report. Qwest raised this issue for the first time in its comments on the Supplemental Report. Qwest proposed language to be added to § 16.4, which, it asserts, prevents Qwest from having to pay both CPAP payments and remedies under federal rules.

b. The Commission agrees that, as a theoretical matter, the CPAP should recognize, and take into account, federal wholesale service quality rules to avoid Qwest's paying

twice for the same performance. This would treat state wholesale service quality rules and federal service quality rules in a similar manner. However, the FCC has not yet promulgated any federal wholesale service quality rules. Thus, Qwest's proposal is premature. When and if the FCC promulgates federal service quality rules, the Commission can consider whether or not to amend the pertinent sections of the CPAP.

J. Acceptance Of The CPAP

1. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachment. If the verified statement is not clear and unambiguous, the Commission will assume that Qwest does not accept the Commission-approved CPAP and will recommend to the Federal Communications Commission that Qwest has not complied with the public interest requirements of § 271.

2. The Commission finds that this clear statement is necessary to have Qwest's acceptance or non-acceptance on record

as soon as possible. If Qwest does not accept the CPAP contained in this decision and its Attachments, the Commission will consider what additional proceedings, if any, are necessary with respect to the Commission's investigation into Qwest's compliance with § 271. As the hearing commissioner and the entire Commission has made abundantly clear, Qwest acceptance of this Commission-approved CPAP is the *sine qua non* of a favorable Commission recommendation to the FCC. There will be no additional changes to the CPAP (other than to correct typographical errors and to make nonmaterial clarifying changes). Therefore, Qwest's failure to accept the Commission-approved CPAP may well result in no further Commission proceedings, or in substantially changed Commission proceedings, before the Commission makes its recommendation to the FCC.

V. ORDER

A. It Is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual SGAT language that must be adopted by Qwest and implemented as the CPAP for this Commission favorably to recommend § 271 compliance. The recommended SGAT language in Attachment A reflects decisions

from the original CPAP Orders, as well as any modifications ordered here. Attachment B reflects the changes, in redline, made to Attachment A of Decision No. R01-1142-I.

2. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachments.

3. Time Warner filed an objection to the decision of the hearing commissioner remanding the four specific areas of the CPAP to the Special Master. That motion is denied as moot.

4. *Sua Sponte,* we will strike the phrase in § 13.1 that reads "Beginning 60 days after the Commission's adoption of this CPAP," as extraneous. Qwest has provided mock reports since December, 2001 and is required to continue to do so as ordered in R01-1142-I. These reports should now incorporate the decisions in this order as applicable. Once Qwest receives § 271 approval from the FCC for Colorado, actual payments to the CLECs and the Special Fund shall begin.

5. *Sua Sponte,* we have made other clarification and typographical changes throughout the CPAP language attached to this decision as Attachments A and B. These are non-substantive changes.

6. This Order is effective immediately on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 27, 2002.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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